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IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

THE STATE OF FLORIDA,

Petitioner,

v.

MARK ROYER,

Respondent.

RESPONDENT'S REPLY BRIEF ON JURISDICTION

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QUESTION PRESENTED

The Respondent believes that the phraseology of the question presented by the Petitioner inaccurately depicts the holding of the unanimous en banc Florida District Court of Appeal decision. Based upon the decision appealed from, Respondent submits that the following question is the proper one presented to this Court by the decision the Petitioner seeks to have reviewed:

> WHETHER THE DECISION OF A UNANIMOUS EN BANC FLORIDA APPELLATE COURT IS A MISAPPLICATION OF THE FOURTH AMENDMENT WHERE THE COURT SUPPRESSED CONTRABAND SEIZED BY NARCOTICS' OFFICERS BASED ON THE FOLLOWING FINDINGS:
>
> > 1) DEFENDANT WAS "IN CUSTODY" IN ABSENCE OF PROBABLE CAUSE WHERE HE A) ACCOMPANIED TWO AIRPORT NARCOTICS OFFICERS TO SMALL OFFICE, B) WAS INFORMED HE WAS SUSPECTED OF TRANSPORTING NARCOTICS, C) HIS AIRLINE TICKET AND LUGGAGE WERE TAKEN FROM HIM BY THE OFFICERS.
> >
> > 2) "DRUG COURIER PROFILE" USED BY NARCOTICS OFFICERS MAY POSSIBLY SUBJECT DEFENDANT TO INVESTIGATORY ("TERRY") STOP BUT DOES NOT CONSTITUTE PROBABLE CAUSE TO ARREST OR CONFINE DEFENDANT.
> >
> > 3) DEFENDANT'S CONSENT GIVEN AFTER UNLAWFUL CONFINEMENT WAS INVOLUNTARY AND INVALID.

4) EXIGENT CIRCUMSTANCES SERVE TO "EXCUSE" SEARCH WARRANT BUT DO NOT TAKE PLACE OF PROBABLE CAUSE.

TABLE OF CITATIONS

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OPINIONS BELOW

The District Court of Appeal of Florida, Third District filed a unanimous en banc decision on September 9, 1980 [reported at 389 So.2d 1007 (Fla. 3d DCA 1980)] reversing the trial court's denial of Defendant's Motion to Suppress and reversing a split Florida District Court panel opinion which had affirmed the trial court. The opinion of the Florida District Court of Appeal is not contained in Petitioner's Appendix. Respondent's counsel has, however, been informed by Petitioner's counsel that the Supreme Court record will be supplemented with this opinion.

The Florida Supreme Court denied the State's application for review.

JURISDICTION

The opinion of the Florida Appellate Court is consistent with the Fourth Amendment to the Constitution of the United States and applicable interpretive case law decided by the United States Supreme Court. Contrary to the Petitioner's contentions, a fair reading of the unanimous en banc decision of the Florida Appellate Court demonstrates that the principals of law it sets forth are consistent with the Fourth Amendment and United States Supreme Court decisions including United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and Terry v. Ohio, 392 U.S. 1 (1968). The Royer case does not involve any substantial federal question not before determined by the Supreme Court.

As a result, the Respondent does not believe that this Court has jurisdiction to

consider this case by granting certiorari as the Petitioner requests. The Royer case is a lengthy and well-reasoned opinion which has clarified the law in this area of the country and has set forth usable guidelines for the interpretation of these issues by trial judges. Recently, the United States Supreme Court unanimously refused to review another Florida case, Florida v. Stewart, U.S. Sup. Ct. Case No. 80-1319, cert. denied June 22, 1981 which presented some of the same issues urged by the Petitioner in the instant case.

Further, it is clear that a state can employ a more stringent interpretation of the Fourth Amendment than does the federal government. Therefore, even if the Royer case holds the State of Florida to a stricter interpretation of the Fourth Amendment than does the federal government, Royer is not subject to reversal on this premise.

Royer does not decide a federal question in a manner inconsistent with applicable United States Supreme Court decisions nor does it involve a federal question not previously determined by the Supreme Court. As a result, there is no jurisdiction for review by this Court.

STATEMENT OF THE CASE

A. Comment on Petitioner's Statement of the Case.

Petitioner's Statement of the Case frequently quotes from the split Florida appellate decision which was later reversed unanimously by the same appellate court sitting en banc. Respondent submits that this rendition of the facts is inaccurate both in its categorization of the operative facts and in its categorization of the Defendant's legal position; e.g.:

> . . . . the Defendant. . . contends the court's finding of consent was error because he was not told he could refuse consent, and that because such consents were given to police officers as a matter of law it could not be held that his consents were free and voluntary. (Petitioner's brief p. 11 quoting from split panel opinion 389 So.2d at 1009.)

Such a statement is totally and completely inaccurate since nowhere in Defendant's briefs nor at oral argument did the Defendant claim error because (a) the Defendant was not informed of his right to refuse consent or (b) because consents made to police officers are involuntary as a matter of law. Defendant acknowledges that police officers have no constitutional duty to inform the Defendant of his right to refuse consent. Whether or not an individual has been informed of his right to refuse consent is only one factor to be considered in the Schneckloth "totality of the circumstances test." However, since Royer was not so informed, this does reflect upon the issue of consent, although it is not determinative of it.

B. Respondent's Statement of the Case.

With citations to the record of the appellate court, the following is a statement of the relevant facts below:

Public Safety Department Officers Johnson and Magdalena were assigned to Miami International Airport on January 3, 1978 and sometime between 12:00 and 12:30 p.m., they encountered the Defendant Mark Royer. (R. 12.) Although neither officer had received any prior information linking Royer to criminal activity, their suspicions were aroused by certain observations. (R. 14.) Officer Johnson testified that he and Magdalena were watching Royer carefully and suspected him of drug trafficking due to his age, nervousness, his two American Tourister suitcases, and the fact that he was looking around continually and watching his bags carefully. (R. 13-19.) Another factor deemed significant by the policemen in regard to Royer's actions is that he paid for his airline ticket in cash. (R. 19, 20.)

After Royer bought his ticket, he was given two stick-on adhesive labels for his baggage which had the name "Holt" written on each. (R. 21, 22.) As Mr. Royer left the ticket counter and proceeded to the departure gate for National Airlines, he was stopped by Officers Johnson and Magdalena. (R. 22, 23.) The policemen identified themselves and showed Royer their badges and identification cards. (R. 23.) Johnson asked Royer to show him his airline ticket and identification. (R. 24.) After giving the policeman his airline ticket, it was never returned or offered back to Royer until after the subsequent search occurred. (R. 44, 46, 53.) Mr. Royer produced a New Jersey driver's license in the name of Mark Royer and explained that a friend had made reservations for him in the name of "Holt." (R. 24, 25.)

The officers told Mr. Royer that they were narcotics investigators and that they had reason to suspect that he was transporting narcotics. (R. 26, 45.) The policemen had Royer accompany them to an interrogation room some forty feet from the point of their encounter. (R. 26, 27.) The room was actually no more than a converted closet fitted with a small desk and two chairs. (R. 27.) Mr. Royer testified that on the way to the room one officer said that the policemen had been waiting for him all morning and wanted to know how much pot was in the bags. Royer was told that he was crazy to try to do this since there were always guards around. (R. 56.) The police did not refute Mr. Royer's testimony.

After Royer reached the police room, Magdalena remained with him as Johnson tore off the baggage stubs from Royer's ticket

and without permission from Royer, went downstairs to get the bags. (R. 41, 42, 45, 46, 55.) No Miranda warnings had been given nor had the Defendant formally been placed under arrest at this point. (R. 43, 44.) After Johnson returned with the suitcases, of which he took possession without requesting the Defendant's consent, he joined Royer and Magdalena in the interrogation room. (R. 45.)

Mr. Royer testified that he was asked to empty his pockets and that among the items he took from his pockets was a luggage key. (R. 57.) Officer Johnson stated that upon entering the police room, Royer was asked if he would give consent to a search of his suitcases so that the policemen could confirm their suspicions that he was carrying narcotics. (R. 28.) Royer stated that consent was never specifically asked for and that after he

was told to unlock one suitcase and did so, one of the officers opened it. (R. 57, 58.) There is undisputed testimony to the effect that Mr. Royer was never told he had a right to disobey the requests of the policemen or that he had a right to leave or refuse to allow the search. (R. 40, 45, 47, 57, 58.) Royer testified that he did not believe he was free to leave at any time during this encounter. (R. 54, 56, 57.)

Officer Johnson stated that in response to his request for consent, Royer did not say anything. (R. 29.) Royer silently produced the key to the white suitcase which was subsequently opened by officer Johnson. (R. 29.) The second suitcase, the gray one, had a combination lock which Royer was unable to open. (R. 29.) After Johnson obtained a screwdriver, the gray suitcase was pried open with no apparent

objection from Mr. Royer. (R. 29, 30.) After viewing the contents of the suitcases, Royer was placed under arrest and read his Miranda rights. (R. 33.)

ARGUMENT

The unanimous en banc Florida Appellate Court used a three-step analysis of the facts involved in this case in order to reverse the denial of Defendant's Motion to Suppress and in order to reject the State's primary argument for affirmance, that Royer effectively and validly consented to the opening of his suitcases. This analysis demonstrates that the Florida Appellate Court relied upon fundamental and sound principles of law consistent with the Fourth Amendment and all United States Supreme Court cases dealing with similar issues.

1) Royer involuntarily confined. It is clear from the facts presented to the trial judge that the actions of the officers, who took and never returned the Defendant's ticket and baggage, constituted a "detention," "confinement," or "arrest" of

the Defendant. Other factors also contributed to the conclusion that an arrest had in fact occurred. Royer was confronted in an airport and told that he was speaking with narcotics officers who "had reason to suspect he was transporting narcotics." (R. 26.) Therefore, the investigation was focused on an individual. The officers then took the Defendant's ticket and baggage stubs and retrieved his luggage for him. (R. 41, 42.) The ticket and luggage were never returned nor offered to him. (R. 44, 46, 53.) The Defendant was asked to go to an interrogation room and on the way to the room, one of the officers told Royer that they had been waiting all morning for him and asked how much pot was in the bags. (R. 56.) Mr. Royer testified that he did not believe he could leave at this point. (R. 54, 56, 57.) There is little question

that a reasonable person would not believe he was free to walk away from the narcotics officers under these circumstances. Therefore, an arrest occurred.

2) No probable cause. Royer was detained or arrested without probable cause at the time the alleged consent was given. The only basis for the detention of the Defendant was a mere similarity with some of the contents of a drug courier profile. The Appellate Court held, in accordance with state and federal case law, that conformity with a drug courier profile does not constitute probable cause sufficient to arrest the Defendant. In fact, in this case the arresting officer unequivocally admitted in the trial court that no probable cause existed prior to the actual discovery of the contents of the baggage. (R. 36.)

As dicta, the court also stated that the drug courier profile is insufficient even to constitute an articulable suspicion required to justify a Terry stop. In this regard only, the Florida Appellate Court stated that the Mendenhall case appeared to be contra. However, it must be noted that the Royer court held that Royer had been detained and not merely stopped in a Terry context. As a result, the Royer case merely reiterates a fundamental principal of criminal law, i.e. an individual cannot be detained without probable cause. The decision then states, in conformity with state and federal law throughout the United States, that probable cause does not arise by similarity with a drug courier profile

alone.* In this way, the Royer case is consistent, or at least not inconsistent, with the Mendenhall case and with the case of Reid v. Georgia, 65 L.Ed. 2d 890 (1980).

3) Consent tainted and invalid. The court went on to hold that since Royer had been unlawfully confined, the law of Florida directs that any subsequent consent is presumptively tainted and rendered

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*During the course of oral argument before the en banc court, Petitioner's counsel was challenged by the court to cite a single case, state or federal, which holds that merely the exhibition of certain drug courier profile characteristics amounts to probable cause subjecting an individual to arrest. Petitioner's counsel could not so cite the court then and even now cites no authority in support of such a position.

involuntary. The consent would only be held voluntary if there was a clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior illegal action. The court finding no such proof, held that Royer's consent must be deemed involuntary and invalid as a matter of law.

Finally, the court held that the State's claim of "exigent circumstances" would at most excuse the officers from obtaining a warrant. However, exigent circumstances do not take the place of probable cause necessary to arrest an individual or sustain any search. Therefore, the presence or absence of exigent circumstances is irrelevant to the actual issues decided by the appellate court.

This court found in Mendenhall that the Fourth Amendment had not been violated by the stopping of the Defendant, but at no time did the court hold that similarity to the "drug courier profile" constituted probable cause to arrest the Defendant. In the Royer case, the appellate court specifically determined that Royer had been arrested, not merely stopped.

The majority opinion in Mendenhall clearly based its decision on the specific facts of that case. Some of these facts, absent in the Royer case, include the fact that the Defendant in Mendenhall had her plane ticket and driver's license returned to her prior to the time she was asked to go to an office. Justice Rehnquist stated that their was no "objective reason" to believe that the Defendant in Mendenhall was not free to proceed on her way.

However, in the Royer case the Defendant's ticket and luggage were never returned nor offered to him. In addition, Royer had specifically been told that the officers "had reason to suspect he was transporting narcotics." (R. 26.) Therefore, there is little question that Royer had an objective basis for his belief that he was not free to go. Royer testified to this effect in the trial court. (R. 54, 56, 57.)

Therefore, Royer and Mendenhall, although factually distinguishable, consider similar issues of law and present conclusions of law which are consistent. Although the Royer case makes a passing comment that the drug courier profile is insufficient for purposes of a Terry stop, this particular legal issue was unnecessary in reaching the conclusion that Royer was illegally arrested by the narcotics officers.

CONCLUSION

Although the Petitioner thoroughly confuses the relatively simple issues considered by the Florida Appellate Court, it is clear that the Royer case presents facts and conclusions of law which are consistent with the Fourth Amendment and interpretive case law rendered by the United States Supreme Court. Simply put, the en banc unanimous decision of the Florida Appellate Court found that the actions of the narcotics officers amounted to an arrest of the Defendant. The only basis for the actions of the officers was that the Defendant met certain characteristics of the drug courier profile which the court determined did not constitute probable cause to arrest the Defendant. As a matter of fact, the arresting officer unequivocally admitted

that he had no probable cause prior to the actual discovery of the contents of the baggage. (R. 36.) Having arrested Royer without probable cause, his alleged consent was presumptively tainted and involuntary.

The above conclusions of law are basic, sound principles consistent with every United States Supreme Court case on this issue and consistent with nearly all major state and federal cases dealing with such a situation. As a result, there is no basis for this court to grant certiorari to the Petitioner.

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